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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1223

KARL H. MEYER,

Petitioner,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

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WHY THE PETITION SHOULD BE GRANTED.

I. THIS COURT'S INTERVENING DECISION, AND SUBSTANTIAL AUTHORITY NOT PREVIOUSLY ARGUED, CONTROL THE SIGNIFICANT FREE SPEECH QUESTION RAISED AND REQUIRE REVERSAL.

In this case petitioner was giving a speech against the Viet Nam War while standing on a public sidewalk. He remained where he was when the police asked him to

leave and for doing so was later convicted of interfering with a police officer in the performance of his duties. Petitioner contends that the conviction is in violation of the protections guaranteed under the First Amendment. This Court denied a petition for a writ of certiorari, three Justices dissenting, on April 6, 1970. Subsequently, on April 20, 1970, this Court decided *Bachellar* v. *Maryland*, (No. 729, October Term, 1969), Brennan, J. Under the holding of the *Bachellar* case, the writ should be granted and the opinion below should be reversed. The same result should be reached under this Court's decision in *Street* v. *New York*, 394 U.S. 576, at 592 (1969), in an opinion of Mr. Justice Harlan, substantial authority for reversal not previously argued.

QUESTIONS PRESENTED.

A. Can a person who is engaged in free speech and who cannot be convicted for the speech itself, and who cannot be convicted for disorderly conduct for (a) refusing to move on at a police order, or (b) for the earlier disorder of his spectators, be convicted for interfering with a police officer on either of these grounds, where his conduct was the same under both charges?

B. Can a conviction stand on a general judgment order that could have been based either on (a) the unpopularity of words, or (b) the earlier disorder of spectators—but in any ~~case, where,~~ it is agreed that, petitioner did not engage in any conduct (i.e. whether picketing, demonstrating or sitting-in) but merely spoke?

ARGUMENT.

This free speech conviction should be reversed (1) under *Bachellar* v. *Maryland*, *supra*, and *Shuttlesworth* v. *Birmingham*, 382 U.S. 87 (1965), as defendant was convicted for failure to move on where there was no legal basis for the command, and/or (2) under *Street* v. *New York*, *supra*, and *Bachellar* v. *Maryland*, *supra*, as the conviction was or could have been based in whole or in part on the unpopularity of petitioner's free speech, or the earlier disorder of the spectators.

This is an important case of broad significance, for to allow the judgment below to stand is to hold that a speaker may be stopped by the whim of a police officer, particularly if he feels the speaker's lawful speech is unpopular, and because the decision below actually invites spectators who disagree with a speaker to become so unruly as to invite the police to order the speaker to leave. Thus, the decision below honors the heckler's veto of conduct protected under the First Amendment,(*) in conflict with the Court's decision in *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969).

Bachellar was decided by this Court on April 20, 1970, and thus is intervening authority, because the decision of this Court in this case was on April 6, 1970. *Street* is also controlling, and is substantial authority available to petitioner, but not previously argued.

(*) Kalven, *The Negro And The First Amendment*, (1965), pp. 140-160.

Intervening Decision of This Court of Controlling Effect: Bachellar v. Maryland

Under What Circumstances, If Any, May a Speaker Constitutionally Be Convicted For Refusal to Obey Police Order to Move On?

The question presented by the instant case and which requires decision by this Court, is whether refusal to obey is constitutionally punishable when the person who refuses is speaking on public issues, and is not engaged in any other conduct.

In *Bachellar* v. *Maryland*, this Court reversed a conviction for disorderly conduct where one of the grounds in the charge to the jury defined "disorderly conduct" to be "refusal to obey a policeman's command to move on when not to do so may endanger the public peace."(*) The defendants in *Bachellar*, participants in an anti-war demonstration, were arrested while on the public sidewalk, after they had been expelled from a military recruiting station.(**)

(*) The Court below in the present case reached the same decision when it reversed petitioner's conviction, based on the same facts, for disorderly conduct.

(**) This Court noted that there was a conflict in the evidence as to whether petitioners were completely blocking the sidewalk This Court further noted that there were 50-150 people, including the demonstrators, in the area at the point of arrest. This Court noted that on the record in *Bachellar*, defendant's convictions could have constitutionally rested on a finding that the defendants sat on the sidewalk with the intent of fully blocking passage along it, or "that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on." However, this Court held that because of the nature of the law under which defendants were charged, and because of the general verdict rendered by the jury, it was not possible to say that either of the above grounds was the basis for the verdict, and that defendants may have been convicted merely because defendants' views were offensive to some of their listeners.

In the present case it is agreed that petitioner neither intended to nor actually blocked anyone.

Thus, the question raised in the present case—*i.e.* whether failure to obey by a person who is engaged in free speech may be convicted where there had been some disorder by spectators—was touched on, but not decided, in either of these cases.

Bachellar, taken together with the earlier, *Shuttlesworth* decision, *supra*, opinion by Mr. Justice Stewart, establishes that (1) although a person constitutionally may be convicted for refusal to obey when he is blocking passage, (2) he may not be constitutionally convicted of failure to obey when he is simply standing on the sidewalk and there are no actual or potential consequences attached to his remaining or leaving.

Bachellar, as well as *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), *Cox* v. *Louisiana*, 379 U.S. 536 (1965), *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) and *Street* v. *New York*, *supra*, *Gregory* v. *City of Chicago*, *supra*, decided that constitutionally one could not be convicted for speech, although unpopular, annoying or offensive, so long as it is not inciting, *d. Feiner* v. *New York*, 340 U.S. 315 (1951), or provocative ("fighting words"), *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), and even though the listeners to the speech caused a riot or near riot, *Gregory* v. *City of Chicago*, *supra*. There was no such conduct here.(*) The words themselves not being

(*) The Illinois Supreme Court mistakenly characterized the situation at the time of arrest as "degenerating to one of physical battle" (App. to Petition, p. 5a). But the record is otherwise, and this Court, where a claim of protected conduct has been made, must make an independent examination of the record, *Bachellar*. In so doing, this Court will find that, at the point of arrest, there was no disorder or other illegal activity on the part of the listeners, and only 20-30 people were present (R. 33):

> Q. And what, if anything, did Mr. Meyer do after you asked him to leave the area?

constitutionally punishable, it is not clear how a refusal to obey an order to stop speaking the same words can support a conviction. Or to put the point baldly: petitioner was convicted for free speech. The Illinois Supreme Court so said (App. 5a):

> "Defendant was arrested when he wilfully refused to obey the order to disperse and attempted to continue the conduct [speaking] which was producing the disorder."(*)

Can a person constitutionally ever be convicted where "the conduct" which he "attempt[s] to continue" is speech?

To answer this question in the affirmative means to (1) override this Court's decision in *Gregory* v. *City of Chicago*, and (2) to invite the unruly heckler to veto protected conduct.

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cont.

A. He stood up on his can, or whatever it was, and crossed his arms and said, "I will not leave. You can arrest me if you please."

Q. Now, at that time did any people stand around or mill around, watching Mr. Meyer?

A. They stopped and watched the on-coming arrest.

Q. I see. Was there a large group that remained at that time?

A. No, sir.

Q. Approximately how many people had remained?

A. I would say approximately 20 to 30 people.

[Testimony by arresting officer.]

(*) Contrast the reversal (App. 6a) in the disorderly conduct conviction:

> ". . . defendant was charged and convicted of disorderly conduct because of the manner in which he conducted his 'forum'."

This point is discussed below in Point II.

II. REVERSAL IS REQUIRED BECAUSE PETITIONER'S "INTERFERENCE" CONVICTION MAY BE BASED ON HIS PEACEFUL AND ORDERLY SPEECH, OR ON THE DISORDER OF THE SPECTATORS.

Petitioner's conviction should be reversed because he may have been convicted for his speech, which is protected from conviction and punishment by the First Amendment, or because of the earlier action of his listeners, for which constitutionally he is not responsible. In *Street* v. *New York, supra,* and in *Bachellar* v. *Maryland, supra,* this Court reversed where convictions could have rested in whole or in part on the unpopularity of the content of the demonstrators' First Amendment conduct. The present case is stronger than either *Street* or *Bachellar.* First, petitioner was engaged in pure speech, there was no demonstration and no activity on his part where he intended to or did obstruct anyone or engage in any other physical act. In *Bachellar,* there was a sit-in and blockage. In *Street,* there was the physical act of burning the flag. Second, in *Bachellar* and in *Street,* there was evidence that could have been read to support a constitutional conviction, and evidence that could have been read to find that the conviction was based on First Amendment protected activity. In the present case there is no such ambiguity and no such alternative interpretation. The "conduct" which petitioner attempted to continue, Illinois Supreme Court Opinion, Pet. for Cert., App. 5a, was speaking words. The Court below recognized both of these factors in reversing the disorderly conduct conviction, but failed to do so when dealing with the conviction for "interfering."

The conduct requisite for conviction under the Chicago "interfering" ordinance is interfering with or hindering a police officer in the discharge of his duties. The record shows (and the Court below agrees) that there was no physical interference on petitioner's part. He merely remained standing and speaking after being told to leave. Hence, any "interference" by petitioner must lie in his speech or in his inaction of not leaving.(*)

With respect to petitioner's conviction for disorderly conduct, the Illinois Court, following this Court's opinion in *Gregory*, recognized that the "speech" ground was immunized from the conviction and punishment by the First Amendment, and that a conviction on that basis could not stand. It, therefore, reversed the disorderly conviction (App. 5a-6a):

> "'The conviction for disorderly conduct is subject to the same criticism the Supreme Court made in *Gregory*. The record indicates to us that defendant was charged and convicted of disorderly conduct because of the manner in which he conducted his 'forum'."

(*) It is unlikely that any "conduct" of petitioner was unlawful, as he was engaged solely in speech. However, for purpose of argument and analysis, it would appear that his "conduct" can be broken down as follows: (1) petitioner's speech on the merits (ideas about the Viet Nam War), (2) his words of refusal to leave, and (3) his inaction of not leaving. But, in any event it is not possible from the record to determine which of these elements was, in the trial court's mind, the basis for the finding of guilty. Indeed, it appears that a combination of these elements formed the basis for the finding, constitutionally impermissible under *Bachellar* and *Street*.

> "The Court: By his own testimony and his own admission, the defendant admits he was asked to leave, and he decided not to leave. He asked to be arrested instead.
>
> By his own admission, he got back onto this can—whatever it was—and kept on talking. It is the considered opinion of this Court that defendant is guilty . . ." (R. 54)

Precisely the same analysis requires reversal of the "interfering" conviction. It is no more possible to determine with respect to the "interfering" conviction whether it is grounded in petitioner's speech itself or in his inaction in not leaving but remaining to continue to speak(*) than it is possible to make such determination with respect to the "disorderly" conviction. The trial court's finding of guilty was given in general terms, and as the Illinois Court notes, petitioner's arrest, for both charges, was not made until after he had refused to disperse and had "attempted to continue the conduct [*i.e.* speech] which was producing the disorder." App. to Pet. for Cert., 5a. Yet, to the extent the "interfering" conviction is based on the "speech" element alone, or the "speech" element in combination with any of the other elements, petitioner has been convicted for speech, a ground upon which the conviction constitutionally may not rest.

(*) [The arresting officer]: (R. 34)

A. Then I then proceeded to arrest Mr. Meyer.

Q. When you placed Mr. Meyer under arrest what, if anything, transpired?

A. He very slowly, procession-like, walked to the squad car.

Q. When you told him he was under arrest did you advise him that he was to come into your custody?

A. Yes, sir. "You are under arrest. You will come with me."

Q. Did he go with you?

Did he voluntarily get off the stand and walk to the police car?

A. Yes, he did.

CONCLUSION.

This Court should grant this petition and reverse the conviction below, and in doing so, protect the right of free speech.

Respectfully submitted,

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